

STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Land Division  
Honolulu, Hawaii 96813

January 27, 2011

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Hawaii

Forfeiture of General Lease No. S-5188, Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Lessee, Auhaukeae, North Kona, Hawaii, Tax Map Key: (3) 7-5-09:43.

PURPOSE:

Forfeiture of General Lease No. S-5188, Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson, Lessee.

LEGAL REFERENCE:

Section 171-39, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Auhakeae situated at North Kona, Hawaii, identified by Tax Map Key: (3) 7-5-09:43, as shown on the attached map labeled Exhibit A.

AREA:

.338 acres, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CHARACTER OF USE:

Lessee shall use or allow the premises leased to be used solely for commercial purposes as may be permitted under the zoning ordinances of the County of Hawaii.

TERM OF LEASE:

50 years, commencing on May 19, 1989 and expiring on May 18, 2039. Last rental reopening occurred on May 19, 2009; next rental reopening is scheduled for May 19, 2019.

ANNUAL RENTAL:

\$31,150 due in semi-annual payments.

REMARKS:

General Lease No. S-5188 covering Tax Map Key: (3) 7-5-09:43 (Parcel 43) was sold at public auction held on May 18, 1989. Lanihau Partners L.P. (Lanihau), as the successful bidder, was issued a 50-year lease for commercial purposes. Through mesne assignments with consent of the Board of Land and Natural Resources, the lease was assigned to Brad Radcliffe Anderson, Cord Dominis Anderson, and D.G. Anderson (Lessee), pursuant to Board action of January 8, 2010, Item D-15. The Chairperson signed the consent to the assignment on August 31, 2010.

Parcel 43 is centrally located in Kailua-Kona, and is surrounded by a commercial development known as the Coconut Grove Marketplace (Marketplace). The Marketplace occupies Tax Map Keys: (3) 7-5-09:25 & 28 (the Marketplace Parcels). See Exhibit A. Both Parcel 43 and the Marketplace Parcels are located in the Special Management Area (SMA).

The original lessee under the subject lease, Lanihau, was also the owner/developer of the Marketplace. According to County of Hawaii Planning Department records, the Planning Commission issued SMA Use Permit No. 277 on December 28, 1988 to allow for the construction of a commercial specialty center and related improvements on the Marketplace Parcels. After Lanihau acquired the subject lease of Parcel 43 at auction, the Planning Commission on September 27, 1990 approved an amendment to SMA Use Permit No. 277 to allow Parcel 43 to be developed as a passive park in the center of the commercial complex. The Planning Commission's approval of the amendment included the following language:

The provision of a park area within the commercial development will improve the quality of coastal scenic and open space resources and will not inhibit coastal recreational opportunities.

General Lease No. S-5188 itself sets forth requirements pertaining to open space on the parcel:

Lessee shall at its own expense, develop and maintain a landscaped, coastal-view park on not less than fifty percent (50%) of the leased premises in accordance with plans and specifications submitted by the Lessee to and approved by the Chairperson prior to construction.

Lanihau and/or its successors and assigns generally maintained Parcel 43 as a landscaped open parcel with a sand volleyball court on it. According to a news article that appeared in the West Hawaii Today on July 30, 2010, the owner of the Marketplace Parcels defaulted on a mortgage encumbering the private lands (but not Parcel 43) in 2009. A foreclosure action is now pending on the Marketplace Parcels. The volleyball net on Parcel 43 was apparently taken down in February 2010.

On or about September 15, 2010, staff received a complaint that a fence had been constructed around the perimeter of Parcel 43. Staff conducted an inspection on September 16, 2010 and photographed a fence with a PVC pipe frame installed in the ground with metal T-posts. In some places, the uprights for the fence were located on cement walkways, and holes had been drilled in the cement to accommodate the fence posts. A heavy shade cloth was fastened to the PVC frame to create a barrier about 5'11" high between Parcel 43 and the surrounding lands. See photos attached as Exhibit B.<sup>1</sup>

The County of Hawaii Planning Department issued a Notice of Violation and Order (NVO) dated September 29, 2010 to Lessee, the DLNR Chairperson and others. The NVO explained that the Planning Department had received a complaint about the fence construction on the property and conducted its own inspection on September 15, 2010. The NVO stated in part as follows:

Based on all of the findings recited above, the Planning Director finds that you are in violation of Sections 205A-28 of Hawaii Revised Statutes and Section 9-8A of Rule 9 of the 'Planning Commission Rules,' which states, 'No development shall be allowed within the Special Management Area without obtaining a permit in accordance with this rule.'

Based on the staff inspection and the NVO, and pursuant to the authority granted the Chairperson by the Board of Land and Natural Resources at its meeting of January 11, 1980 and the breach provision contained in General Lease S-5188, the Andersons were served a Notice of Default by certified mail dated October 6, 2010 for:

---

<sup>1</sup> By the time these photos were taken, unknown persons had already unfastened the shade cloth from the top fence rail. The shade cloth can be seen folded up along the base of the fence.

- X Failure to comply with applicable laws.
- X Failure to comply with lease requirements regarding construction of structures or improvements on the land.
- X Waste and unlawful, improper or offensive use of premises.
- X Failure to comply with the character of use provision in the lease.
- X Failure to comply with the landscaping requirement in the lease.

The notice, accepted by Lessee or their agent on October 14, 2010, offered Lessee a 60-day cure period to correct the default. This cure period expired on December 13, 2010. As of January 27, 2011, the first default listed above remains uncured.

Following is further information on the basis of the defaults noted in DLNR's NOD to Lessee.

**Compliance with Laws.** Section 7 of General Lease S-5188 provides in part that the "Lessee shall comply with all the requirements of all municipal, state and federal authorities and observe all municipal, state and federal laws applicable to the premises, now in force or which may be in force." The NVO from the Planning Department states that Lessee is in violation of County of Hawaii and State laws.

**Improvements.** Section 9 of General Lease S-5188 provides in part the "Lessee shall not at any time during the term construct, place, maintain and install on the premises any building, structure or improvement of any kind and description except with the prior written approval of the Board and upon those conditions the Board may impose, including any adjustment of rent, unless otherwise provided in this lease..." The erection of the fence involved the placement of metal T-posts in the ground and in several places the drilling of holes in concrete to support the fence posts. The fence is an improvement or structure erected without the prior written approval of the Board.

**Waste.** Section 6 of General Lease S-5188 provides in part that the "Lessee shall not commit, suffer or permit to be committed any waste, nuisance, strip or unlawful, improper or offensive use of the premises or any part..." The September 16, 2010 site inspection showed that a PVC fence had been erected along the perimeter of the premises. The fence's vertical posts used metal T-posts for support. A heavy shade-cloth was fastened to the fence rails and posts to create a barrier between the premises and the lands around it. The erection of the fence creates a nuisance or an improper or offensive use of the premises with respect to adjoining landowners and the public.

**Character of Use.** Section 12 of General Lease S-5188 provides in part that the "Lessee shall use or allow the premises leased to be used solely for commercial purposes as may be permitted under the zoning ordinances of the County of Hawaii." The erection of the fence around the perimeter of the premises prevents its use for commercial purposes and constitutes a separate default under the lease.

**Landscaping.** Section 37 of General Lease S-5188 provides that the "Lessee shall at its own expense, develop and maintain a landscaped, coastal-view park on not less than fifty percent (50%) of the leased premises in accordance with plans and specifications submitted by the Lessee to and approved by the Chairperson prior to construction." The erection of a fence along the perimeter of the premises is inconsistent with the landscaping requirement that coastal-view park be maintained on 50% of the premises.

By letter dated October 15, 2010 to DLNR, Lessee D.G. Anderson advised that the temporary security fence had been removed. The letter further advised that Lessee would have an architect design a fence that would satisfy the coastal view requirement and would apply to the Planning Department for an SMA permit for the construction of the fence.

By letter dated November 8, 2010, the Land Division Administrator responded to D.G. Anderson's letter of October 15, 2010 advising that Land Division must receive written confirmation from the Planning Department that the NVO had been cured, rescinded or otherwise withdrawn, and that the default under DLNR's NOD would remain uncured until such confirmation was received. The November 8 letter reiterated that Lessee would need to submit plans and specifications for the fence to Land Division before undertaking any construction activity. The November 8 letter discussed other lease requirements as well as the need to comply with the SMA laws.

By letter dated December 6, 2010 to Cord Anderson that was copied to DLNR, the Planning Department explained that the 1990 amendment to SMA Use Permit No. 277 allowed Parcel 43 to be developed as a passive park in the center of the Marketplace. The letter notes that the Planning Commission's approval of the amendment included the following language:

The provision of a park area within the commercial development will improve the quality of coastal scenic and open space resources and will not inhibit coastal recreational opportunities.

The Planning Department's December 6 letter concludes that Lessee's proposal to install a 5'11" temporary dust fence on Parcel 43 will therefore require an amendment to SMA Use Permit No. 277, a request that must be addressed to the Planning Commission.

The Planning Department subsequently sent a Daily Fines Letter dated December 7, 2010 to Lessee, the DLNR Chairperson and others stating that remnants of the fence were still on the ground, that the time for correcting the violation in the NVO had expired and that \$27,000 in fines had been imposed as of the date of the letter. The Chairperson responded by letter dated December 23, 2010, explaining, among other things, that DLNR takes the matter seriously and would be seeking the Board's approval for the cancellation of the lease and the forfeiture of the Lessee's performance bond.

At the very least, the default for "failure to comply with applicable laws" remains uncured. In view of the risk of fines being assessed against the State as the owner of Parcel 43 based on Lessee's defaults, staff is recommending that the lease be canceled. For a performance bond, Lessee has posted with Land Division an Irrevocable Standby Letter of Credit (ISLC) issued by First Hawaiian Bank in the amount of \$62,300. The lease provides that in the event of a default or breach, the full amount of the bond shall be paid to the State as liquidated and ascertained damages, and not as a penalty. Accordingly, staff is including a recommendation below that the Board authorize Land Division to draw the full amount of \$62,300 against the ISLC, and to pay any outstanding fines assessed by the Planning Department if funds are available after covering damages, costs and expenses incurred by the State.<sup>2</sup>

Finally, Land Division issued a subsequent Notice of Default to Lessee dated December 3, 2010, for failure to post the required liability insurance. The notice sent to Lessee was returned unclaimed. See Exhibit C. FHB was copied on this Notice of Default as well. According to Land Division records, Lessee currently has no liability insurance for the premises as required by the lease.

RECOMMENDATION: That the Board:

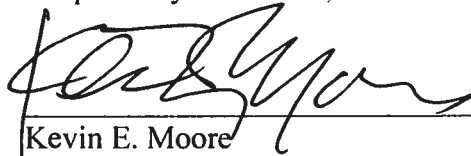
1. Authorize the cancellation of General Lease No. S-5188 in the manner specified by law;
2. Authorize the retention of all sums heretofore paid or pledged under General Lease No. S-5188 to be applied to any past due amounts;
3. Authorize Land Division to draw the full amount of \$62,300 against the Irrevocable Standby Letter of Credit issued by First Hawaiian Bank for General Lease No. S-5188, and to pay any outstanding fines assessed by the Planning Department if funds are available after covering damages, costs and expenses incurred by the State;

---

<sup>2</sup> Land Division copied First Hawaiian Bank (FHB) on the NOD to Lessee dated October 6, 2010, and the Chairperson's December 23, 2010 response letter to the Planning Department. Copies of this submittal will be mailed to Lessee and First Hawaiian Bank when this matter is confirmed on the Board's agenda.

4. Terminate the lease and all rights of Lessee and all obligations of the Lessor effective as of January 27, 2011, provided that any and all obligations of the Lessee which have accrued up to said effective date or which are stated in the lease to survive termination shall endure past such termination date until duly fulfilled, and further provided that Lessor reserves all other rights and claims allowed by law; and
5. Authorize the Department of the Attorney General, the Department of Land and Natural Resources, or their agents to collect all monies due the State of Hawaii under General Lease No. S-5188 and to pursue all other rights and remedies as appropriate.

Respectfully Submitted,



Kevin E. Moore  
District Land Agent

APPROVED FOR SUBMITTAL:

  
William J. Aila, Jr. Interim Chairperson

MT







September 16, 2010







September 16, 2010



LINDA LINGLE  
GOVERNOR OF HAWAII



STATE OF HAWAII  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

December 3, 2010

LAURA H. THIELER  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

PAUL J. CONRY  
ACTING FIRST DEPUTY

LENORE N. OHYE  
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAROLAWA ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

Ref: HD-GL5188

CERTIFIED MAIL: 7009 0820 0001 6775 0981

BRAD RADCLIFFE ANDERSON  
CORD DOMINIS AND D.G ANDERSON

HONOLULU, HI 96816

Dear Lessee:

NOTICE OF DEFAULT

Pursuant to the authority granted me by the Board of Land and Natural Resources at its meeting of January 11, 1980, and the breach provision contained in General Lease S-5188, you are hereby served a Notice of Default on said lease for failure to do the following:

- ☐ Keep lease rental payments current
- ☐ Post required Performance Bond
- ☐ Post required Fire Insurance Policy
- ☒ X Post required Liability Insurance Policy  
(Expired: 10/31/2010)
- ☐ Other

You are hereby given sixty (60) days from the date of receipt of this letter to cure the above-described breach.

**EXHIBIT C**

Your failure to act on the above matter may result in one or more of the following:

1. Cancellation of General Lease S-5188.
2. Retention of all sums heretofore paid under General Lease S-5188 as liquidated damages.
3. Termination of all your rights and obligations under General Lease No. S-5188.
4. Forfeiture of your lease performance bond.

We therefore urge your fullest cooperation. Should you have any questions, please contact Sara Hamasaki at our Hawaii District Land Office at (808) 974-6203.

Sincerely,



LAURA H. THIELEN  
Chairperson

cc: Land Board Member  
Bond Holder (First Hawaiian Bank)  
District Office  
Central Office

Q



616-5189  
 AFTER 10 DAYS, RETURN TO  
 DEPARTMENT OF LAND AND NATURAL RESOURCES  
 LAND DIVISION  
 P.O. BOX 621  
 HONOLULU, HAWAII 96808

2011 JAN 12 P 1:45  
 RECEIVED  
 LAND DIVISION  
 HILO, HAWAII

**CERTIFIED MAIL RECEIPT**  
 (Domestic Mail Only: No Insurance Coverage Provided)  
 For delivery information visit our website at www.usps.com

**OFFICIAL USE**

Postage	\$
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees	\$

Postmark Here

Sent To  
**Brad Anderson**  
 Street, Apt. No., or PO Box No.  
 City, State, ZIP+4  
**Honolulu, HI 96816**

PS Form 3800, August 2005

STATE OF HAWAII  
 LAND AND NATURAL RESOURCES  
 POST OFFICE 1  
 HONOLULU, HAWAII  
 December

BRAD RADCLIFFE ANDERSON  
 CORD DOMINIS AND D.G ANDERSON  
 HONOLULU, HI 96816

Ref: HD-GL5188

CERTIFIED MAIL: 7009 0820 0001 6775 0981

BRAD RADCLIFFE ANDERSON  
 CORD DOMINIS AND D.G ANDERSON  
 HONOLULU, HI 96816

Dear Lessee:

NOTICE OF

Pursuant to the authority granted me by the meeting of January 11, 1980, and the breach provisions are hereby served a Notice of Default on said lease:

- ☐ Keep lease rental payments current
- ☐ Post required Performance Bond
- ☐ Post required Fire Insurance Policy
- ☒ X Post required Liability Insurance (Expired: 10/31/2010)
- ☐ Other

You are hereby given sixty (60) days from above-described breach.

7009 0820 0001 6775 0981

UNCLAIMED  
 RETURN TO SENDER  
 UNABLE TO FORWARD  
 NIXIE 968 SC 1  
 00 01/06/11  
 PS: 968083121 90872-14215-03-40

7009 0820 0001 6775 0981

UNITED STATES POSTAGE  
 \$ 05.540  
 02 1R  
 0006560488  
 DEC 03 2010  
 MAILED FROM ZIP CODE 96813

UNCLAIMED